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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1034

RAYMOND R. BIRCH AND BIRSEN N. BIRCH, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DAVID G. BRESS
THOMAS C. GREEN
GINSBURG, FELDMAN AND BRESS
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Attorneys for Petitioners

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on December 12, 1972.

OPINIONS BELOW

The only opinion in this case, that of the Court of Appeals, is not yet reported. It is reproduced here in the Appendix at page 1a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 12, 1972, but not separately issued from the opinion. A petition for rehearing was denied on December 29, 1972, and the mandate was stayed pend-

ing this application. (Appendix at p. 8a). This jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

QUESTIONS PRESENTED

Following their trial and conviction in a German court for mistreating a minor, which proceeding petitioners claim was fundamentally unfair, they were denied shelter and employment and were left without the means to support themselves and their five infant children. Compelled to find a way to survive, petitioners, who were citizens, returned to the United States. Subsequently, they were indicted and convicted of aiding and abetting the false making and counterfeiting of military leave orders and of thereafter possessing said orders with intent to defraud and of falsely representing that they had been issued such orders in the act of boarding separate commercial airline flights in Germany having destinations in the United States. Against this background the following questions are presented:

1. Whether Section 499 of Title 18, United States Code, under which petitioners were prosecuted, invested the District Court with jurisdiction to try them for an alleged extraterritorial fraud directed against foreign civilians, as specifically charged in the indictment?

2. Whether petitioners should have been allowed to present evidence to demonstrate the necessitous circumstances which confronted them in Germany and the unjust aspects of their German trial in support of their defenses of justification and duress?

3. Whether petitioners' rights to due process were violated where the indictment specifically charged, but the Government failed to prove, that in boarding par-

ticular airline flights in Germany petitioners possessed false military leave orders with intent to defraud and falsely represented that they were individuals to whom military leave orders had been issued and where the Government further failed to prove that petitioner Birsen Birch participated in the making and counterfeiting of such orders?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V, provides, in pertinent part:

> No person shall . . . be deprived of life, liberty or property, without due process of law . . . ."

Section 499 of Title 18, United States Code, provides:

> Whoever falsely makes, forges, counterfeits, alters, or tampers with any naval, military, or official pass or permit, issued by or under the authority of the United States, or with intent to defraud uses or possesses any such pass or permit, or personates or falsely represents himself to be or not to be a person to whom such pass or permit has been duly issued, or willfully allows any other person to have or use any such pass or permit, issued for his use alone, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

Petitioner Raymond Birch was born and raised in Brooklyn, New York (Tr. 222). At the time of trial below he was 48 years old (Tr. 221). In October of 1954 he commenced employment with the United States Department of Defense working in the Exchange or "PX" System (Tr. 222). He was initially assigned

as general manager of the PX System in England where he was in charge of all retail, commissary and service operations (Tr. 222).

In late 1955 Mr. Birch was promoted to a position in Ismir, Turkey to establish the first PX System. While employed in that endeavor he met petitioner Birsen Birch, and they were ultimately married in Ismir in 1958 (Tr. 223).

In 1960 Mr. Birch was reassigned to England, during which tour three children were born (Tr. 225). In 1964 the Birches desired to have someone to help with the children. Mrs. Birch's mother, who lived in Turkey, located a young Turkish girl, Nahide Karapinar, and brought her to England to join the Birch family (Tr. 225-227).

In 1965 the entire family, including Nahide, moved to Germany, where Mr. Birch had again been reassigned with the Exchange System (Tr. 227). The family temporarily lived in military housing and then moved into private quarters in a German residential neighborhood in Bonames, a small suburb of Frankfurt (Tr. 228-229, 232-233).

From the outset the Birches had difficulty with their neighbors, most of whom would not speak to them. Though the Birches made a number of efforts to overcome this aloofness, it remained for the entire period during which they lived in the neighborhood (Tr. 229-231).

In 1966 Mr. Birch was programmed for reassignment to Atlanta, Georgia, but his departure was extended to March 15, 1967 until after the expected birth of his fourth child (Tr. 236-237). In anticipation of

this move, petitioner made arrangements for Nahide's return to Turkey (Tr. 233, 238). In late January of 1967, two days before Nahide's departure, a German policewoman accompanied by two American military policemen came to the Birches' home and informed Mrs. Birch that the Birches had been accused of mistreating Nahide. The girl was taken to the main precinct in Frankfurt and later to the Frankfurt clinic (Tr. 233, 237-239).

Five or six days after this occurrence petitioners were interrupted during supper at their home by the German Criminal Police. Two men and a woman entered the house and insisted that the Birches accompany them for questioning. When Mrs. Birch attempted to call the American Consulate, one of the policemen stepped on her hand and drew his gun and reminded her that she was in Germany, not America. Within minutes the apartment was full of police; the entire family was taken into custody after a struggle had ensued when the police tried to separate petitioners from their children (Tr. 240-242).

Upon reaching the police station, the children were undressed and when the oldest resisted he was slapped and started vomiting (Tr. 407). Mrs. Birch was then separated from her children, but when she refused to give up her baby, she was held by the head, legs and arms, and punched while the infant was taken (Tr. 407).

Crying and bleeding from cuts on her arms and from menstruation, having given birth to another child only six weeks previously (Tr. 408, 243), Mrs. Birch was given only a sleeping pill while incarcerated that night. The next day, having had nothing to eat and requiring

medical attention, she passed out in her cell and was taken to the jail hospital where she remained for the next month, until released on bond (Tr. 408-409, 411).

Following their release petitioners were able to regain custody of their children whom the Germans had placed in orphanages (Tr. 248-249). As a condition of release Mrs. Birch was ordered to report to the Mayor's office twice each week, in Babenhausen. During the next three years this prescribed ritual became an oppressive burden, as it required her to walk with her children 40 minutes in either direction, even throughout the period of her pregnancy and that which followed the birth of her fifth child (Tr. 414-415).

During this three year interval between arrest and trial, the Birches were constantly subjected to brutal threats, humiliating accusations and inflammatory publicity. The German press referred to them as the "American torture couple" and to Mrs. Birch as "the witch." (Tr. 247). They received numerous threats on their own lives and the lives of their children, both through the mail and by telephone, and at one point, in response to such a threat, the family was evacuated from the military housing in which they were permitted to live (Tr. 250-251).

Petitioners' criminal trial in Germany on charges of mistreating a minor commenced in September, 1970 (Tr. 256), and continued to its conclusion, in a charged-up atmosphere of sensationalism with swarms of cameramen and newsmen (Tr. 262-263). In the view of petitioner Raymond Birch it was replete with error and conducted in a manner which was fundamentally unfair making the outcome apparently preordained (Tr. 264-265).

Facing the prospect of further incarceration in a German jail as a result of her conviction, Mrs. Birch contemplated suicide (Tr. 416-417). Her hope that her husband might remain free to care for their children evaporated when the German court ignored the prosecutor's request that Mr. Birch receive a suspended sentence (Tr. 416). Petitioners were again admitted to bond pending appeal, but Mr. Birch's employment with the Exchange System was terminated and other American organizations were unwilling to hire him. He received his last paycheck on November 6, 1970. Available jobs on the German economy paid $100 per month—not even enough to meet the cost of his children's education at the American military school (Tr. 267-268). He was finally informed by military officials that he had already stayed in military housing beyond the permitted time limit and that he must make arrangements for other housing (Tr. 267-269, 270-271).

Faced with the disintegration of his family (Tr. 271) and without the prospect of adequate shelter, employment income and schooling for his children throughout a minimum two-year period pending appeal, Mr. Birch became obsessed with finding a way to survive (Tr. 268-275).

Petitioners' departure from Germany became the subject of an indictment filed on July 1, 1971 in the District of Maryland, where petitioners had been residing and where they were arrested. The indictment charged petitioners in six counts with violations of 18 U.S.C. Section 499.[1] Count One charged them jointly with falsely making, forging and counterfeiting a military pass and permit, issued by and under the

[1] The entire indictment is reprinted in the Appendix at p. 9a.

authority of the United States, in the name of Sergeant First Class Jack L. Finn to be used without legal authority by petitioner Raymond R. Birch. Count Two is identical with the exception that the false military leave order was alleged to have been made in the name of Sergeant First Class Vivian L. Finn and to be used without legal authority by petitioner Birsen N. Birch.

The remaining four counts pertained to alleged use and possession by petitioners of the respective false military leave orders. Thus Count Three charged in pertinent part that on or about December 10, 1970, *at Munich, Federal Republic of Germany*, appellant Raymond Birch, with intent to defraud, did use and possess a false military leave order in the name of Sergeant First Class Jack L. Finn, *in boarding Lufthansa Airlines flight #408 from Munich to New York.* Count Four similarly charged that on or about December 10, 1970, *at Frankfurt, Federal Republic of Germany*, appellant Birsen N. Birch, with intent to defraud, did use and possess a false military leave order in the name of Sergeant First Class Vivian L. Finn, *in boarding Pan American Airlines flight #73 from Frankfurt to New York.* (Emphasis added.)

Counts Five and Six alleged that on or about the sames dates, while at the identical, respective locations in Germany and while boarding the identical, respective flights, each petitioner did, with intent to defraud, personate and falsely represent that each was a person to whom had been duly issued a falsely made military leave order.

Trial commenced before United States District Judge Herbert F. Murray without a jury on October 12, 1971. The government's evidence established that

while in Germany Mr. Birch enlisted the assistance of Sergeant James Lee Edwards stationed in Babenhausen as a battalion ammunition Sergeant in the Army. Edwards was the government's *only* witness and testified in pertinent part that he fabricated false military leave orders in the names of Sergeants Jack L. Finn and Vivian L. Finn respectively (Tr. 39-43, 45-52). Edwards also arranged for both petitioners to be photographed so that he could procure for them applications for replacement military identification cards (Tr. 32-39).

The day after the orders were mimeographed Edwards took them in a large envelope to Mr. Birch at his residence where he placed the envelope on a table and departed. (Tr. 85-87). On December 9, 1970 Edwards accompanied Mr. Birch to the Frankfurt airport where he purchased, with money given to him by Mr. Birch, two airline tickets on separate flights to the United States in the civilian names of Mr. and Mrs. Finn (Tr. 58-62, 82-83). Later that evening Edwards and a friend drove Mr. Birch to Aschaffenburg, where he boarded a train for Munich (Tr. 62-63).

At 8:00 a.m. the following morning Mrs. Birch came to Edward's quarters. Edwards then drove her to the Frankfurt airport where he observed her pass through German customs and display her shot record and ID application form (Tr. 64-65). The only other document Edwards saw Mrs. Birch display was her airline ticket (Tr. 66). He admitted that he had not accompanied Mr. Birch to Munich, so that he had no knowledge of what occurred there when Mr. Birch boarded an aircraft. Moreover, Edwards stated that he *never saw Mrs. Birch display a leave order to anyone in con-*

nection with her departure from the Frankfurt Airport. Edwards confirmed that he really did not know what happened to the leave orders, or whether they were ever used by either petitioner, after he dropped the envelope on the table in Mr. Birch's residence. (Tr. 85-87).

He also stated that on at least one prior occasion he had travelled from Germany to the United States by commercial airline and that his leave orders were used on that occasion to depart his place of duty and not for customs purposes (Tr. 93-94).

The government concluded its case with the introduction of further documentary evidence by way of stipulation. The pertinent evidence may be summarized as follows: A United States Customs Inspector, if called, would have testified that on December 10, 1970 he processed a customs declaration form bearing the name Jack L. Finn and also received from the same individual who gave him the declaration a copy of a special leave order issued in the name of Sergeant First Class Jack L. Finn (Tr. 96). A second inspector would have testified that on the same date he processed a declaration form in the name of Vivian L. Finn. No special leave order in that name was produced by the government (Tr. 96-97). An F.B.I. agent would have testified that latent fingerprints discovered on the declaration form bearing the name Vivian L. Finn were identified as those of appellant Birsen N. Birch (Tr. 98). The above documents, including the F.B.I. report, were received into evidence.

Petitioners' Motions For Judgment of Acquittal were denied, after which they renewed their request, initially made pretrial, to present evidence in support

of the defenses of duress and justification which would demonstrate (1) that their trial in Germany was fundamentally unfair and resulted in an unjust conviction, and (2) that as a result thereof they were left in necessitous circumstances sufficient to excuse their subsequent conduct.[2]

The trial court concluded that it would not recognize the defense of justification and permit testimony from third parties directed to the fairness of the German criminal proceedings and "the nature of the situation in which [petitioners] found themselves following their trial such that it would . . . justify their attempt to leave Germany." (Tr. 160). The trial court did not foreclose receipt of such testimony "if we ever reach the point of a conviction in this case . . . as to the question of sentence" (Tr. 163). Thereafter, petitioners testified in their own defense; they were granted some latitude to describe the circumstances of their plight, but the court received the testimony as relevant only to whether petitioners' state of mind was sufficiently disturbed so as to negate the element of specific intent required by Section 499 (Tr. 165-168-170).[3]

The testimony of Dr. George Weickhardt was similarly considered by the trial court as applicable only

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[2] Petitioners based their charge of an unfair trial principally upon the fact that the German trial court would not permit them to establish that the minor girl whom they were accused of mistreating recanted under oath prior to the German trial and confirmed that she had not been abused or mistreated at the hands of petitioners.

[3] Petitioner Raymond Birch's poignant testimony at this juncture of the trial defies adequate distillation and summary and accordingly the referenced pages of the transcript have been reprinted at pages 13a-18a of the Appendix.

to the issue of intent rather than the proffered defenses of justification and duress. It was the witness' expert opinion that as of December, 1970, the Birches had been subjected in their own minds to a progressive and pernicious series of vital deprivations, to wit: loss of their liberty, children, employment, and the threatened loss of their home, without the prospect of further assistance. (Tr. 440-441). In psychiatric terms they were subjected to numerous stresses, including the stress of residing in a foreign country, the stress resulting from a language barrier, the stress of prolonged litigation, the stress of being ostracized by their neighbors and the stress of unusual publicity (Tr. 441).

These stresses created conflicts, some of which the Birches were able to resolve, but the many conflicts which were not resolved over a period of several years led to frustration and maladaptive behavior. Occasionally their frustrations were ameliorated, as when Mrs. Birch took tranquilizers and had crying spells and Mr. Birch took to drinking (Tr. 442).

The degree of frustration experienced by the Birches inevitably led to vacillation and indecision, and ultimately to faulty judgment. They manifested the symptom of isolating themselves in order to protect themselves to the point where Mrs. Birch became humiliated and outraged whenever she suspected people were talking about her. Eventually the Birches reached a stage of panic and were approaching a psychotic state, which caused their judgment to become faulty and erratic. They had been subjected to so much stress that they were on the verge of mental illness (Tr. 444).

Although the Birches suffered from an abnormal mental state, they were capable of seeking a solution

to their plight, but their condition tended to make them disregard the legal consequences of alternative courses of action by submerging them in their consciousness (Tr. 444-446, 465).

In their abnormal mental state the Birches would have readily accepted any solution "that had the slightest bit of promise to it" (Tr. 460), "particularly if they [knew] that it's not going to result in pain or injury to someone else" (Tr. 461).

Following the testimony of Dr. Weickhardt petitioners attempted to introduce into evidence sworn statements of Nahide Karapinar averring that she had not been mistreated [4] by petitioners and that she had lied during the German trial. Petitioners contended that such statements were corroborative of their state of mind up to and after their trial and were relevant to whether they received a fair trial at the hands of the Germans. The trial court was of the view that petitioners' contentions had been adequately presented by way of their own testimony, and that further consideration of their claims was unwarranted (Tr. 468-679).

At the conclusion of the trial on October 18, 1971 each petitioner was found guilty on all applicable Counts. On January 13, 1972, in disregard of the recommendation of the United States Attorney that each petitioner be incarcerated for 6 months, with the

[4] Counsel marked for identification two sworn statements of Nahide Karapinar dated September 4, 1971 and September 28, 1971. Counsel requested the government to produce a copy of another recantation sworn to by Mrs. Karapinar prior to the convening of petitioners' trial in Germany in the presence of a United States Army Major assigned to the Office of the Staff Judge Advocate in Frankfurt. The government represented that the document was unavailable in its files (Tr. 472-475).

balance of any term imposed to be suspended,[5] petitioner Raymond Birch was sentenced to a term of imprisonment of two years on each of the applicable counts, said terms to run concurrently, and petitioner Birsen N. Birch was sentenced to a term of imprisonment of five years under the provisions of Section 4208 (b) of Title 18 U.S.C. to permit further study and a report to the Court. Petitioners' convictions were affirmed by judgment of the United States Court of Appeals for the Fourth Circuit on December 12, 1972. By order dated December 29, 1972 the appellate court stayed the mandate pending this application for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. Section 499 of Title 18 U.S.C. Did Not Confer Jurisdiction Upon the District Court to Try Petitioners for an Alleged Extraterritorial Fraud

Both before the trial court and appellate court petitioners contended that their indictment must be construed as specifically charging them with criminal conduct allegedly committed exclusively in Germany with intent to defraud agents of two air carriers and that the trial court was without jurisdiction to apply Section 499 of Title 18 extraterritorially to try them for fraudulent conduct directed *not* at the United States Government or its agents.

Although the statute is silent on whether it applies extraterritorially, the appellate court concluded that Congress must have intended such application and that the scope of the statute was based on "the principle of protective jurisdiction." Appendix at p. 5a. This analysis, however, runs afoul of this Court's opinion in

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[5] Transcript of sentencing proceedings, January 13, 1972, p. 20.

United States v. *Bowman,* 260 U.S. 94 (1922), where a distinction was drawn between crimes committed against private individuals and those committed against the government itself.

> We have in this case a question of statutory construction. The necessary locus, when not specially defined, depends upon the purpose of Congress, as evidenced by the description and nature of the crime, and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations. Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement and *frauds of all kinds which affect the peace and good order of the community, must, of course, be committed within the territorial jurisdiction of the government where it may properly exercise it.* If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard. *Id.* at 98, (Emphasis added).

The opinion further recognized that certain criminal statutes which are silent on extraterritorial application are "not logically dependent on their locality for the government's jurisdiction, but are enacted because of *the right of the government to defend itself against obstruction or fraud, wherever perpetrated . . . .*" *Id.* at 98, (Emphasis added). Under this limited exception to the principle of territorial jurisdiction, this Court upheld the validity of an indictment charging Bowman and others with conspiring to defraud a corporation in which the government was a stockholder.

Contrasting with the facts in *Bowman,* the prosecution below, at least as framed by the indictment, did not

involve a fraud upon the United States, even though a military document may have been the alleged instrumentality of such a fraud. The Grand Jury focused only on whether petitioners committed a fraud upon agents of civilian airlines in Germany, so that the character of the fraud was clearly of the kind "which affect[ed] the peace and good order of the community" cognizable only in the courts of Germany pursuant to its territorial jurisdiction. Accordingly, petitioners submit that the principle of protective jurisdiction may not be invoked as a basis to extend the scope of Section 499 to punish extraterritorial frauds where agents and representatives of the United States Government are not the alleged object of the fraudulent conduct.[6] Since the indictment did not charge extraterritorial offenses against the United States, the District Court lacked jurisdiction to try petitioners, and such fundamental error can only be corrected by the granting of a writ of certiorari.

II. Petitioners Were Improperly Restricted in the Presentation of Their Defenses of Justification and Duress

Petitioners moved by pretrial motion and during trial for a ruling permitting them to present evidence to establish, *inter alia*, that they were not permitted in the course of the German proceedings to demonstrate that Nahide prior to trial recanted under oath and confirmed that she had not been abused or mistreated.

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[6] It is notable that other than the *Bowman* case, the only decisional authority cited by the appellate court on the issue of jurisdiction is the case of *United States* v. *Pizzaruso*, 388 F.2d 8 (10th Cir.), *cert. denied*, 392 U.S. 936 (1968). *Pizzaruso*, however, clearly involves crimes against agents of the government because the appellant was convicted of making a false statement under oath in a visa application to an American consular official located abroad.

Petitioners also sought to show that their trial was conducted with other, substantial procedural irregularities, including denial of their request to have the complaining witness examined by independent physicians, and that their trial was political in nature and motivated and initiated by German authorities for extraneous considerations and partly to embarrass the American military establishment. Petitioners also desired to present the testimony of third parties to establish and corroborate the necessitous circumstances, which, as a result of their conviction by the German court, left them desperate and with no prospect of employment or adequate housing for themselves and their five children during the subsequent appellate process which would have continued for approximately another two years.

Petitioners predicated admission of this testimony and evidence as relevant to the defenses of justification and duress, and they contended that their conduct was excusable under the law because their sentence to incarceration and deprivation of liberty which followed their unfair trial in Germany, coupled with the necessitous circumstances which descended upon them and threatened their very survival, produced such intense apprehension of serious bodily harm, that they were compelled to commit a technical violation of the law.

The District Court refused to permit such testimony because it would require "looking behind" the German conviction and because it concluded that duress would excuse criminal conduct only where the defendant acted under threat of immediate and grave bodily harm (Tr. 163-164). The District Court was of the opinion that petitioners' proffer—even if established—would not, as a matter of law, excuse or justify their subse-

quent conduct. The appellate court approved the rigid guidelines announced at trial and characterized petitioners' argument and proffer as a request for the application of "a more lenient test." Appendix at 7a.

The nature of the defense of justification which petitioners sought to present is an outgrowth and extension of the legal theory in support of the right to self-defense—the right to justifiably break the law and use reasonable force under certain circumstances. A defense of justification is predicated on the common law doctrine of necessity which sanctions acts ordinarily proscribed by the law when such acts are committed out of a reasonable belief that they are necessary in the "avoidance of an evil greater than the evil sought to be avoided by the law defining the offense charged."[7] Justification thus posits a choice between evils and a balancing of the value of the interest believed by the actor to be at stake with the value of the interest to be invaded.

The general rule governing self-defense at common law is that one who is himself free from fault is privileged to use force in self-defense when three conditions are satisfied. The first is that he reasonably believes the other intends to commit a battery upon him and this belief has been induced by the other's conduct. The second is that the force is not unreasonable in view of the harm which it is intended to prevent. And the third is that the defender reasonably believes that the threatened harm is imminent and cannot be avoided without using such force.[8] The test is not the actuality of impending harm nor the actual amount of force

[7] Comments to § 3.02, Model Penal Code, (Tent. Draft No. 8, 1958).

[8] R. Perkins, *Criminal Law*, 995 (1969).

necessary to prevent it. The reasonable belief of the defender is controlling in both respects.[9]

Petitioners were obviously not charged with the use of force, yet the criminal acts they were convicted of were compelled by, and the result of, a series of circumstances which would have justified the use of force —or a technical violation of the law—under traditional self-defense theory. If petitioners were subjected to an unfair trial in Germany, their sentence to incarceration and deprivation of liberty equals or exceeds in degree any apprehension which could be caused by the threat of battery. As such, their misuse of official documents, if proven, constitutes a drastically less severe solution to their predicament than the use of force, since the evil of unjust incarceration could not otherwise have been avoided.

In this connection some examination of the German proceedings should have been permitted below. Contrary to the District Court's view that it was unorthodox to "look behind" foreign judgments, this Court as well as other courts in the contexts have examined foreign criminal judgments to prevent injustice in the course of subsequent judicial proceedings. And in this regard it should be noted that the Constitution does not command that full faith and credit be given to foreign judgments. See, *Hilton* v. *Guyot*, 159 U.S. 113 (1894).

Many states have "multiple offender" or "habitual criminal" statutes, the purpose of which is to authorize increased punishment when it is shown that the accused has been convicted previously of a designated number of prior offenses of a certain type. A number of states

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[9] *Id.* at 993-994; Model Penal Code § 3.09; *Spicer* v. *People*, 11 Ill. App. 294 (1882).

specifically give effect to foreign criminal convictions by providing that a conviction in any other "state, government, or country" of a crime which if committed within the state would be a "felony," (or "offense") may be used as a basis for imposing increased punishment on the offender.[10]

Although only a few cases have arisen under these statutes, they make clear that before the foreign conviction will be given effect under the statute, the court must go behind the conviction and determine whether the procedure utilized by the foreign court granted the offender "due process of law" as that phrase is understood in American law. *Loper* v. *Beto,* 405 U.S. 473 (1972); *Burgett* v. *State of Texas,* 389 U.S. 109 (1967); *United States* v. *Murphy,* 265 F.2d 57 (2nd Cir. 1958); see also *United States* v. *LaVallee,* 306 F.2d 417, 420 (2nd Cir. 1962).

A foreign criminal judgment may have the effect of barring an alien from entering the United States, but the Immigration Service and courts will go behind the judgment and examine the motivation behind the prosecution and the evidence relied upon to sustain the conviction where it is alleged that the alien has been convicted of a political offense. Convictions for crimes ostensibly involving moral turpitude will not result in exclusion if it appears that the convictions were "based on trumped up charges or predicated upon repressive measures against racial, religious or political minorities." 22 C.F.R. 42.91 (a) (9) (vii); 22 C.F.R. 42.91 (a) (10) (v). See also 39 Ops. A.G. 215 (1938) (perjury committed by Jew under oppressive conditions in Nazi Germany did not involve moral turpitude).

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[10] See, for example, Cal. Pen. Code § 668 (West 1956); Colo. Rev. Stat. Ann. § 13-39-13.1 (1958); Minn. Stat. Ann. § 610.29 (1947).

If the facts behind a foreign criminal judgment are susceptible of review for purposes of the immigration laws and in connection with other facets of the criminal law, there is no inherent legal obstacle to examining such a judgment to determine whether or not the manner in which it was procured would justify an attempt to avoid its harsh effect.

From a policy point of view it appears that no viable or substantial distinction can be drawn between the threat of a battery justifying the use of reasonable force to repel an attack and a sentence of incarceration imposed by reason of an unjust conviction justifying the improper use of official documents. In fact, in the latter case, the policy for permitting the justification to be presented is even more compelling, simply because the conduct engaged in to escape the primary evil does not involve the use of force and is not so desperate or extreme as to be universally repugnant to reasonable men.

Concepts of self-defense or self-help based on the theory that certain criminal conduct is justifiable, have been formulated into a general defense of justification by the drafters of the Model Penal Code. They accept the view that "a principle of necessity, properly conceived, affords a general justification for conduct that otherwise would constitute an offense; and that such a qualification like the requirements of culpability, is essential to the rationality and justice of all penal prohibitions." [11]

The Code thus outlines the elements of the defense of justification, applicable in any case where the evil

[11] Comments to § 3.02, Model Penal Code, (Proposed Official Draft, 1962).

sought to be avoided is greater than that sought to be prevented by the law defining the offense, as follows:

> (1) Conduct which the actor believes to be necessary to avoid an evil to himself or to another is justifiable, provided that:
>
> > a). the evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
> >
> > b). neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
> >
> > c). a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

Under this formulation what constitutes an evil and which of two evils is the greater are issues which should be ultimately submitted to the trier of fact.

Petitioners contend that the principle of justification as set forth in the Model Penal Code has clearly been recognized and is applicable to the facts in this case, particularly because the evil sought to be avoided (unjustified incarceration) is obviously greater than the evil proscribed by Section 499. It indisputable that measured by any system of values unlawful possession or use of a military pass or permit offends the integrity of the United States substantially less than unjustified incarceration would have harmed petitioners. To deny them the right to introduce evidence of their desperate plight in justification of their conduct is tantamount to concluding that no circumstances will excuse a technical violation of the criminal law. To our knowledge no court has ever embraced this position.

The defense of justification also embraces the concept of duress or compulsion. The same exigent circumstances which gave rise to a justification for a technical violation of Section 499, as the lesser of two evils, operated as well to erode petitioners' resistance and to compel a violation of said section. Petitioners, therefore, should have been permitted to prove that any violation of Section 499 resulted from the fact that they were left with no alternative which would have secured and preserved their liberty, and that subjection to unjust imprisonment constituted a threat to their security which they were unable to resist.

The Model Penal Code has formulated the defense in the following terms:

> Section 2.09: Duress: (1) It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.[12]

Perkins suggested the following rule for finding an excuse on the basis of compulsion or necessity:

> Any threatened harm, whether by man or by the elements, which would have induced a person of reasonable firmness to do what defendant did, should be recognized as an excuse.[13]

Many formulas used by courts in determining whether the defense of duress exists provide that the danger apprehended must be present, imminent, and

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[12] § 2.09 Model Penal Code, Proposed Official Draft, 1962).

[13] R. Perkins, *Criminal Law*, § 960 (2d Ed. 1969).

impending at the time of the actual commission of the crime. On the other hand, the standard of necessity has opened the way to a liberalization of duress standards. Here the law has recognized that not only threats to life, or serious and immediate bodily harm, but also threats of a longer, slower, and apparently less grave nature, can justify the doing of a criminal act. Thus the courts have permitted threats to general safety and health [14] to substantiate a showing of necessity sufficient to excuse the actor from criminal responsibility, and the framers of the Model Penal Code have adopted the position that "long and wasting pressure may break down resistance more effectively than a threat of immediate destruction." [15] Newman and Weitzer in their analytical discussion of the defense point out:

> The difficulties inherent in any attempt to carve out stable categories of "past," "present," and "future" from a continuously flowing and relative time continuum come to the fore no more sharply than in the law's requirement that the force being exerted must be present at the actual commission of the act . . . . To say that a threat of future harm is not sufficient is to ignore the fact that the nature of a threat is to hold out a future harm. All danger to the "duressed" is in the future, for if it were in the present it would no longer be a danger or a threat but would be an accomplished harm.[16]

As a result, Newman and Weitzer advocate that the standard requiring the danger threatened to be pres-

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[14] Parr v. State, 117 Ohio 23, 157 N.E. 555 (1927); *State v. Hall*, 74 N.H. 61, 64 A. 1102 (1906).

[15] Comments to § 2.09, Model Penal Code, (Tent. Draft No. 10, 1960).

[16] L. Newman and L. Weitzer, *Duress, Free Will and the Criminal Law*, 30 S. Cal. L. Rev. 313, 328 (1957).

ent, imminent, and impending, and the "threats" to be neither past nor future, should be abandoned.

> The law should state that the danger threatened need only be as far before or as far after the act as the jury believes is necessary under the particular circumstances (e.g. strength of force, the gravity of the crime, the psychology of the coerced, the elements present in the general situation, the relationship between the individuals) to have deprived the will of its freedom at the time the crime was committed." [17]

The foregoing discussion demonstrates quite clearly the limitations and deficiencies inherent in the federal rules of duress and justification as their scope was perceived by both the trial court and the Fourth Circuit in its opinion below. The unwillingness of the trial court to consider evidence other than petitioners' testimony—and its decision to consider their testimony, as well as that of Dr. Weickhardt, as bearing *only* upon petitioners' capacity to form the element of specific intent—can not be reconciled with the degree of insight into human behavior which can capably be presented to the trier of fact with the aid of expert testimony. The restrictions placed upon petitioners by the trial court in the presentation of their defense fell far short of advancing the search for the reasons in explanation of their conduct. Thus petitioners should have been permitted to introduce all evidence probative of the contention that fear and anxiety generated by their desperate plight and the threat of unjustified incarceration operated in their minds to compel their conduct. Any rule less permissive is predicated on an archaic and simplistic analysis of duress—that only a gun to

[17] *Id.* at 334.

the head will excuse a technical violation of the law. For these reasons petitioners submit that a writ of certiorari should be granted to permit this Court to fashion a more sophisticated rule of duress and justification, reflective of the present insight available through psychiatric testimony and compatible with the interests of justice.

III. Petitioners' Rights to Due Process Were Violated by the Government's Failure To Offer Evidence and Prove the Specific Charges Contained in the Indictment

Counts Three and Four of the indictment essentially charged that on December 10, 1970 petitioners, with intent to defraud, did use and possess a false military pass and permit in boarding a particular civilian airline flight. At the close of the government's case petitioners moved for judgment of acquittal on these counts, but their motions were denied. In affirming this decision the appellate court stated at page 8 of its opinion, Appendix at 6a:

> The offenses charged in Counts Three and Four (use of (*sic*) possession with intent to defraud) were completed when the Birches having accepted possession of the forged papers from the army sergeant, boarded the aircraft intending to use the counterfeits to facilitate their departure.

The infirmity in the appellate court's analysis is simply that the Grand Jury charged that petitioners' possession of false military leave orders was with criminal intent in boarding an aircraft to depart Germany. The government, however, failed to offer *any* evidence establishing that airline passengers embarking from Germany were required to have in their possession any document other than their airline ticket. Without such an evidentiary link in the government's theory, it

was impermissible as a matter of law for the fact finder to infer that petitioners acted with a criminal intent in boarding their respective flights. Moreover, the testimony of the government's sole witness, Sergeant Edwards, was to the effect that military orders were needed to leave one's military duty station and were not required by German authorities.

The reasoning of the appellate court seems all the more remarkable in light of the fact that with respect to petitioner Birsen Birch the government failed to prove not only that she possessed a false leave order at the time of boarding her flight, *but also that she ever possessed such a document at any time.* Again, the government's only witness testified that after he prepared two sets of leave orders he delivered them in an envelope to *Mr. Birch* and then left. He further admitted that he never observed Mrs. Birch ever use or possess such a document at the Frankfurt airport or anywhere else, and that he did not "know what happened to the orders" after he delivered them to Mr. Birch (Tr. 85-87). Moreover, the government could proffer no witness to testify that he or she ever received from petitioner Birsen Birch a copy of a military leave order in the name of a Vivian L. Finn (Tr. 96-97). Against such an evidentiary background it is impossible to conclude that the government presented evidence to support the conclusion that Mrs. Birch possessed a false military leave order "intending . . . to facilitate [her] departure" from Germany at the time she boarded a particular airline flight.

Needless to say the government can not be heard to contend that the Grand Jury did not charge petitioners with offenses in Germany in boarding aircraft, but, *instead*, accused them of possessing a leave order with

intent to defraud in connection with their entry into the United States. The very wording of Counts Three and Four, presumably reviewed by the Grand Jury,[18] compels the conclusion that the Grand Jury focused upon petitioners' conduct in Germany. Not one allegation in the entire indictment even remotely suggests that the Grand Jury ever considered evidence supporting a conclusion that petitioners' possession of a leave order upon return to the United States amounted to possession with an intent to defraud, and quite possibly some grand jurors embraced the view of the Second Circuit announced in *Worthy* v. *United States,* 328 F.2d 386 (1964) at page 394:

> We think it is inherent in the concept of citizenship that the citizen, when absent from the Country to which he owes allegiance, has a right to return, again to set foot on its soil.
>
> * * *
>
> We do not think that a citizen absent from his country, can have his fundamental right to have free ingress thereto subject to a criminal penalty if he does not have a passport. The citizen, culpable though he may have been in leaving his country without a passport which he could not obtain, and subject, as he probably was, to a criminal penalty for departing without a passport, cannot, we think, be required to choose between banishment or expatriation on the one hand or crossing the border on the other hand, being faced with criminal punishment and the loss of some of the rights and privileges of citizenship as a felon. Citizenship, the Supreme Court has recently said, is a most precious right, expressly guaranteed by the Fourteenth Amendment to the Constitution.[19]

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[18] See *Gaither* v. *United States,* 413 F.2d 1061 (D.C. Cir. 1969).

[19] See also, *United States* v. *Valentine,* 388 F. Supp. 957, 980, (D. Puerto Rico 1968).

Accordingly, petitioners' conviction on Counts Three and Four are constitutionally defective in the absence of any proof of intent to defraud in boarding aircraft in Germany and of possession of a military leave order by petitioner Birsen Birch. *Thompson* v. *Louisville*, 362 U.S. 199 (1960); *Garner* v. *Louisiana*, 368 U.S. 157 (1960); *Johnson* v. *Florida*, 391 U.S. 596 (1968).

The thrust of Counts Five and Six was that petitioners, respectively, personated themselves to be a person to whom had been issued a false military leave order, with intent to defraud, in boarding their respective flights at Munich and Frankfurt on December 10, 1970. At the close of the government's case petitioners unsuccessfully recalled to the trial court that there had been absolutely *no evidence* introduced that either petitioner ever displayed a leave order at Munich or Frankfurt, and, moreover, that the government's evidence established that petitioners' airline tickets, which were displayed, were issued in civilian names without military designation (Tr. 82-83) and that petitioners departed in civilian dress. Despite these circumstances the appellate court wrote at page 8 of its opinion, Appendix at pp. 6a-7a:

> The offenses charged in Counts Five and Six (impersonation with intent to defraud) were completed when the Birches, armed with the forgeries, *boarded the aircraft falsely posing as military personnel named Finn.* (Emphasis added.)

The appellate court's error in ignoring the record and the fact that the government failed to prove an intent to defraud by either petitioner in boarding aircraft in Germany and even failed to introduce any

evidence showing possession of an order by petitioner Birsen Birch, is compounded by the assertion that petitioners "falsely [posed] as military personnel named Finn." It is irrefutable that the prohibition of personation contained in Section 499 contemplates either actual use and display of a particular document or at least an oral declaration of some sort by the defendant representing that he or she is in possession of such document. How else could an individual "personate" or "falsely represent" within the intendment of Section 499?

It is equally irrefutable that no personation was proved by the government since Birsen Birch was not seen by Sergeant Edwards to display a leave order or overheard to state that she possessed such a document; all that the government illuminated with respect to Raymond Birch's departure was that he also left in civilian clothes in possession of an airline ticket bearing a civilian name. Accordingly, petitioners' convictions on Counts Four and Five are similarly constitutionally defective.

Petitioner Birsen Birch contended both at the end of the government's case and on appeal that the government did not sufficiently establish that she, as distinguished from her husband, aided and abetted Sergeant Edwards in the making and forging of the false military leave orders which was the subject of Counts One and Two. The government's evidence merely indicated that Mrs. Birch asked Sergeant Edwards to petitioners' residence, and that during a subsequent conversation petitioners informed Edwards of the necessity to leave Germany.

The fact that Birsen Birch accompanied Edwards to have her photograph taken is not legally relevant to

whether she aided in the forgery of a false leave order; nor is the fact that Edwards observed her in possession of different documents—an identification card application and a shot record.

The evidence introduced by the government compels the conclusion that it was petitioner Raymond Birch exclusively who, with Edwards, devised the scheme to utilize leave orders as a method of departure and furnished the information which Edwards requested (Tr. 45, 50, 55-56).

Aiding and abetting as used in 18 U.S.C. section 2 "means to assist the perpetrator of the crime." *United States* v. *Williams*, 341 U.S. 58, 64 (1951); *White* v. *United States*, 366 F.2d 474, 475 (10th Cir. 1966); *United States* v. *Carengella*, 198 F.2d 3 (7th Cir. 1952), *cert. den.*, 344 U.S. 881 (1952). Yet the record discloses that it was not appellant Birsen Birch who aided and abetted Edwards in his criminal conduct of procuring false military leave orders. The government was free to interrogate Edwards in an attempt to elucidate with greater precision the degree of petitioner Birsen Birch's alleged participation in the preparation of the specific documents referred to in Counts One and Two. See, *Bailey* v. *United States*, 416 F.2d 1110, 1114 n. 28 (D.C. Cir. 1969). As a result of having ignored that opportunity, petitioner's conviction on said counts is not supported by sufficient evidence.

All of the evidentiary deficiencies discussed above compel the conclusion that petitioners were deprived of due process and that such fundamental error is worthy of review by this Court. Additionally, Section 499, the basis of the prosecution below, has received virtually no judicial scrutiny by any other appellate

court or by this Court. Thus the issue of extraterritorial jurisdiction and petitioners' attack upon the unrealistic scope of the defenses of duress and justification present substantial questions which deserve this Court's consideration.

CONCLUSION

For these reasons, a writ of certiorari should be granted.

Respectfully submitted,

DAVID G. BRESS
THOMAS C. GREEN
GINSBURG, FELDMAN AND BRESS
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Attorneys for Petitioners